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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 795

UNITED STATES OF AMERICA,

Petitioner,

against

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218.

BRIEF FOR THE RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT

Opinions Below.

The opinion of the District Court is reported in 47 Fed. (2d) 336. That of the Circuit Court of Appeals has not yet been reported, and is therefore printed in the appendix.

Jurisdiction.

The jurisdiction of this Court in invoked by petitioner under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

The question presented is whether a licensed vessel of the United States seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters may be proceeded against by the Government only as provided in Section 26, Title II, of the National Prohibition Act, or whether in lieu of so proceeding the United States may libel the vessel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

Statutes Involved.

Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act, are printed in the Appendix.

Statement.

While it is urged by respondent that the Circuit Court of Appeals correctly decided this case, nevertheless by virtue of the conflict between this decision and that of the Circuit Court of Appeals for the Fourth Circuit in

The Pilot, 43 Fed. (2d) 491,

respondent does not oppose the petition.

Respectfully submitted,

LOUIS HALLE,
Attorney for Respondent.

March, 1932.

Appendix.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona

fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered licensed, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

BRITISH S. S. "SEBASTOPOL," her engines, tackle, apparel, and furniture, etc.,
Claimant-Appellee.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21,5 feet, depth 8.1 feet, Official No. 222218,
Claimant-Appellee.

Before: L. HAND, SWAN, and AUGUSTUS N. HAND,
Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer *Sebastopol* for violation of the customs laws, the other seeking forfeiture of the American Schooner *Ruth Mildred* for violation of the navigation laws. In each suit a decree was entered dismissing the libel, and the libellant has ap-

pealed. Decree as to the *Sebastopol* reversed; decree as to the *Ruth Mildred* affirmed.

For opinion below see 47 F. (2d) 336.

SWAN, *Circuit Judge:*

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear, somewhat different considerations are involved and have led us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the National Prohibition Act (27 U. S. C. A., sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the *Sebastopol* sought to enforce against her, pursuant to section 594 of the Tariff Act of 1922 (19 U. S. C. A., sec. 498), penalties incurred by her master under section 584 of said Act (19 U. S. C. A., sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a coast guard officer, who, upon discovery that her cargo was falsely manifested, arrested the master and seized the vessel. The unmanifested cargo consisted of 4,841 cases of Scotch whiskey. Following seizure of the vessel, the coast guard officer signed a complaint charging the master and crew with conspiracy to violate the National Prohibition Act as well as the Tariff Act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the government to proceed against her in accordance with section 26 of title II of the National Prohibition Act (27 U. S. C. A., sec. 40) instead of under the Tariff Act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the government from proceeding under section 26. *Dodge* v. *United States*, 272 U. S. 530; *Commercial Credit Co.* v. *United States*, 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the Tariff Act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 U. S. C. A., secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the Prohibition Act, were it the later enactment, would prevail, as the Supreme Court held it did with respect to Revised Statutes, sec. 3450. *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. But it is to be observed that the particular sections of the Tariff Act under which the libel against the *Sebastopol* was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the Tariff Act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26. Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her forfeiture. The two statutes are to be read so that both may stand, if possible, and we are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the Tariff Act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this Act." In

reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be considered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the Tariff Act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which is forbidden") consigned to the master shall be subject to forfeiture. Under the doctrine of *The Mistinguette*, 27 F. (2d) 738 (C. C. A. 2) the liquor on the *Sebastopol* was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested cargo are likewise applicable although the cargo be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement

in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the National Prohibition Act, we can not interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding *pro tanto* the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the *Sebastopol* was erroneously dismissed.

Different considerations are applicable to the schooner *Ruth Mildred*. She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes, sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the National Prohibition Act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the Tariff Act, the possibility of executive clemency under the provisions of Revised Statutes, section 5294, will not avoid the conflict. Dismissal of the libel against the *Ruth Mildred* was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a coast guard vessel from a point in Long Island Sound until she tied up at a dock in New York Harbor. The crew and master then left her, but a few minutes later the master returned and, on being informed that the coast guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a complaint filed, charging the master with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibilty that the transportation was over so that section 26 no longer applied. *United States* v. *One Buick Automobile,* 33 F. (2d) 352 (S. D. Ga.); cf (before transportation began); *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *United States* v. *One Studebaker Coach Automobile,* 32 F. (2d) 886 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See *Commercial Credit Co.* v. *United States,* 33 F. (2d) 228 (C. C. A. 9); *United States* v. *One Chevrolet Automobile,* 21 F. (2d) 277 (D. Ala.), affd. as *United States* v. *General Motors Acceptance Corp.,* 25 F. (2d) 238 (C. C. A. 5); *United States* v. *One Buick Coach Automobile,* 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the *Ruth Mildred.*

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected, as the Ninth Circuit has certified a similar question to the Supreme Court, *Gen. Motors Acceptance Corp.* v. *United States,* Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unneces-

sary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see *The Pilot*, 43 F. (2d) 491 (C. C. A. 4); *United States* v. *One Reo Coupe Automobile*, 46 F. (2d) 815 (D. Mass.); *The Daisy T*, 48 F. (2d) 370 (D. Del.); *contra*, *Colon* v. *Hanlon*, 50 F. (2d) 353 (C. C. A. 1); *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977 (C. C. A. 5); *United States* v. *One Studebaker Automobile*, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed and decree in No. 280 affirmed.